

IN THE
SUPREME COURT OF THE UNITED STATES

_____ TERM, 197 _____

NO. 75-1078

GIL FLORES,

PETITIONER

VS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Jacob G. Hornberger
915 Victoria Street
Laredo, Texas 78040

John L. Johnson
1620 Guaranty Bank Plaza
Corpus Christi, Texas 78401

Attorneys for Petitioner

TABLE OF CONTENTS

| | Page |
|---|------|
| TABLE OF CASES | i |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED FOR REVIEW .. | 3 |
| FEDERAL RULES INVOLVED | 5 |
| STATEMENT OF THE CASE | 5 |
| REASONS FOR GRANTING THE WRIT ... | 13 |
| SUMMARY | 39 |
| CERTIFICATE OF SERVICE | 41 |
| APPENDIX A | 1-4 |
| (Judgment and Opinion of the United States Court of Appeals, Fifth Circuit) | |
| APPENDIX B | 1 |
| (Order of the United States Court of Appeals Denying Petitioner's Motion for Rehearing) | |
| APPENDIX C | 1-2 |
| (Old Rule 41(e) of the Federal Rules of Criminal Procedure) | |
| APPENDIX D | 1-2 |
| (New Rule 41 (e) and (f) of the Federal Rules of Criminal Procedure) | |

TABLE OF CASES

| | Page |
|--|------------|
| Alderman v U.S., 394 US 165, 22 Led2 176, 89 S Ct 961 | 15 |
| Almeida-Sanchez v US, 413 US 266, 37 Led2 596, 93 S Ct 2535 | 7 |
| 29 Am. Jur.2d p. 474 | 22 |
| Cash v Williams, 455 F2 1227 | 18 |
| Glisson v U.S., 406 F2d 423 | 19 |
| Hatch v Reardon, 204 US 152, 51 Led 415 27 S Ct 188 | 14 |
| Jones v U.S., 362 US 257, 4 Led2d 697 80 S Ct 725 | 13, 16, 19 |
| Katz v U.S., 389 US 347, 19 Led2 576 88 S Ct 507 | 16, 17 |
| Mancusi v De Forte, 392 US 364, 20 Led2 1154, 88 S Ct 2120 | 16 |
| McLindon v U.S., 117 US App. D. C. ___, 329 F2 238 | 24 |
| Nardone v U.S., 308 US 338, 84 Led 307, 60 S Ct 266 | 22 |
| Rule 41 (e), Rules of Criminal Procedure- 27, 30, 32 | |
| Rule 41 (e) (f), Rules of Cr. Procedure | 32 |

Table of Cases-Cont'd:

| | Page |
|---|--------|
| Silverthorne Lumber Co. v U.S. 251 US 385, 64 Led 319, 40 S Ct 182 | 21 |
| Simmons v U. S., 390 US 377, 19 Led2d 1247, 87 S Ct 967 | 29, 31 |
| Simpson v U. S., 346 F2 291 | 29 |
| Smith v U.S., 324 F2 879 | 24 |
| U.S. v Brignoni-Ponce, _____ US _____, 45 Led2 607, 95 S Ct _____ | 38 |
| U.S. v Coplon, 185 F2 629 | 24 |
| U.S. v Eldrige, 302 F2 463 | 19 |
| U.S. v Jeffers, 342 US 48, 96 Led 59, 72 S.Ct. 93 | 16 |
| U.S. v Lewis, 270 FS 807, 392 F2 377 | 19 |
| U.S. v Tane, 329 F2 848 | 23 |
| U. S. v Warrington, 17 FRD 25 | 27 |
| Walder v U.S., 347 US 62, 98 Led 503, 74 S Ct 354 | 21 |
| Waldron v U.S., 219 F2 37 | 30, 33 |
| Weed v U.S., 340 F2 827 | 19 |

IN THE
SUPREME COURT OF THE UNITED STATES

_____ TERM, 197 _____

NO. _____

GIL FLORES,

PETITIONER

VS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Gil Flores, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 30, 1975, and to the order of that Court dated December 4, 1975, denying the Petitioner's Petition for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which appears at Appendix A, pages 1 thru 4, and the order of that Court denying the Petition for Rehearing, which appears at Appendix B, page 1, have not been reported as of this date.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit (App. A, pp. 1 thru 4), was entered on October 30, 1975. A timely Petition for Rehearing was denied on December 4, 1975.

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in denying the motion of the Petitioner, Gil Flores, to suppress the evidence (marihuana) seized in a vehicle being operated at the time by an alleged co-conspirator?
2. Did the trial court err in permitting testimony to be received from the alleged co-conspirator?
3. Did the Honorable Court of Appeals err in holding that even though the District Court prior to the trial, and without a hearing, denied petitioner's motion to suppress on the ground of lack of standing, the petitioner was required to object to the introduction of the evidence in question at the time the government offered it into evidence and again request a hearing on his motion outside the presence of the jury, and that

his failure to do so rendered any prior errors harmless.

4. Did the Honorable Court of Appeals err in holding, if indeed it did so hold, that the testimony of the Border Patrolmen who stopped and searched the automobile in which the Defendants were riding should not have been suppressed.

FEDERAL RULES INVOLVED

See Appendix C, pages 1 and 2 and Appendix D, pages 1 and 2.

STATEMENT OF THE CASE

This petitioner, Gil Flores, along with one Willie Chapa was indicted by the Grand Jury on a two-count indictment. The first count was a conspiracy count, and the second count was for aiding, abetting, counselling, commanding, inducing and procuring one Ruben V. Sandoval to unlawfully, knowingly and intentionally possess with intent to distribute approximately 800 pounds of marihuana. Ruben V. Sandoval agreed to testify for the Government, and charges against him were dismissed. The two defendants, Flores and Chapa, were tried by a jury and on June 24, 1974, were found guilty on both counts. On

August 19, 1974, each defendant was sentenced to 5 years on each count, such sentences to run concurrently. The alleged offense occurred on July 27, 1973, and the indictment was filed on April 29, 1974. Both defendants entered a plea of not guilty on June 7, 1974. Each of the defendants filed a motion to suppress the evidence (the 800 pounds of marihuana) and the court by order of June 19, 1974, stated: "Following pre-trial conference with counsel this day, it would appear the two defendants were not present at the time of the seizure of the contraband and have no standing to complain. The motion to suppress will be considered by the Court during the course of the trial." No independent hearing on the motion to suppress was held, and counsel for Petitioner has not been able to find anywhere in the record an ultimate ruling on the motion.

As in the case of Almedia-Sanchez v

U. S., 413 US 266, 37 Led 2d 596, 93 S. Ct. 2535, decided by the United States Supreme Court on June 21, 1973, the basic facts in this case are neither complicated nor disputed. There is some confusion as to just where the apprehension of Sandoval, the alleged co-conspirator and witness for the Government, took place, but in any event, it was near the town of La Gloria in Starr County, Texas. Farm Road 755 connects Rio Grande City and La Gloria. Rio Grande City lies close to the Mexican Border. La Gloria is approximately 30 miles from the Mexican Border. Farm Road 1017 connects Hebbronville, Texas, in Jim Hogg County, and La Gloria, and if one goes easterly from La Gloria on Farm Road 1017, he will cross U.S. 281 which connects the lower Rio Grande Valley and Alice, Texas. Farm Road 755 proceeds in a northeasterly direction from La Gloria and ultimately intersects with U.S. 281 near the small community of Rachal in Brooks County, Texas. One of the Border

Patrolmen testified that the truck being driven by Sandoval was apprehended on Farm Road 1017, and the other Border Patrolman testified Farm Road 1076. (See pages 7 and 11 of Record on Appeal). There is no Farm Road 1076 in this area. The two defendants reside in Alice, Texas, and Sandoval resides in San Diego, Texas, approximately ten miles from Alice, Texas. Sandoval testified that he proceeded directly from Rio Grande City towards La Gloria and, therefore, it appears likely that Sandoval was apprehended on Farm Road 755 near La Gloria at a point approximately 30 miles from the Mexican Border. The officers testified that they were on duty on July 27, 1973, and were conducting what they called a "traffic observation" (see p. 5 of Record on Appeal). They were proceeding in a southerly direction when they observed the truck going north and being followed by a white over yellow Ford. (See pp. 5 and 6 of Record on Appeal). Patrolman Tharp

testified "they looked suspicious because they were traveling at a slow speed." The two officers turned around and started following the truck which had been passed by the yellow sedan at that time. They turned their red light on, stopped the truck, Officer Wheeler got out and Tharp proceeded in the Border Patrol car to stop the vehicle which had been behind the truck. The vehicle was stopped, and the occupants (who it was later determined were these defendants) were asked to state their citizenship and to open their trunk. They complied with both requests, and the officer released them, as he had no reason to hold them. See p. 12 of the Record on Appeal. The Border Patrolmen had no search warrant. Sandoval testified that he was asked by the Officer or Officers if he was an American Citizen. He responded "yes"; he was asked if he had a driver's license, and he responded "Yes", and showed it to them. They then asked

him what he had in the truck, and he responded, "nothing." He further stated as follows:

"And they said 'you sure' and I said yes. And they said, 'why don't you tell us? We know you got something in here.' And I said I don't know what's in there. There is nothing in there. So one of them climbed in the truck and he told me to stay where he could see me while the other Border Patrolman went after them." (See p. 27 of Record on Appeal). The Border Patrolmen then proceeded to search the truck, unscrewed some of the paneling and discovered 800 lbs of marihuana. See pp. 12 and 27 of Record on Appeal. The government then made a "deal" with Sandoval that if he would testify against the other parties, all charges against him would be dismissed. The charges were dismissed, and in this case he testified against Flores and Chapa. See p. 33 of Record on Appeal. In his testimony Sandoval stated that he had known Flores approximately

one year at the time of the offense, and that he had done some work on vehicles for Flores. In July of 1973, he testified that he made an agreement with Flores and Chapa to fix a truck for them which was to be used to bring marihuana from the border to Austin. He was to be paid \$1,000.00 for the trip from Rio Grande City to Alice and another \$1,000.00 from Alice to Austin. He testified that the repair of the truck initially was done at Flores' house in Alice, Texas. Approximately a week before the apprehension of Sandoval took place, the two defendants and Sandoval drove to Rio Grande City in Flores' vehicle and ascertained that the marihuana had not crossed from Mexico. They then returned to Alice. See pp. 21 and 22 of Record on Appeal. On the day of the apprehension Flores and Chapa went to Sandoval's house and told him that the Marihuana had gotten across and that they wanted him to drive it for them. He agreed

to this arrangement. See p. 23 of Record on Appeal. The three then proceeded in the yellow car (which was following the truck immediately prior to the apprehension) to Rio Grande City and stopped at a house close to the river. Some persons unknown to Sandoval then took him to a ranch where the truck that he had fixed at Flores' house was located. See pp. 24 and 25 and 26 of Record on Appeal. He started the vehicle, checked the clutch and drove to Rio Grande City. At that point he filled up with gas and started driving towards San Diego and was stopped by the Border Patrolmen near La Gloria. See p. 26 of the Record on Appeal. Sandoval further testified that Flores and Chapa were following him in the yellow car and passed him immediately prior to his being stopped by the Border Patrol.

No objection to the introduction of the marihuana was made by counsel for Petitioner at the time it was offered into evidence.

REASONS FOR GRANTING THE WRIT

Question No. 1 (Restated)

Did the trial court err in denying the motion of the Petitioner, Gil Flores, to suppress the evidence (marihuana) seized in a vehicle being operated at the time by an alleged co-conspirator?

The facts in this case are so close to those in Almeida-Sanchez vs United States (supra) that there is hardly any question that the search and seizure as to Sandoval was unlawful. The primary issue then becomes whether these defendants have standing to object to the unlawful search and seizure.

In Jones vs United States, 362 U.S. 257, 4 Led2d 697, 80 S Ct. 725, the Supreme Court

stated:

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41 (e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' New York ex rel. Hatch v Reardon, 204 US 152, 160, 51 L ed 415, 422, 27 S Ct 188, 9 Ann Cas 736. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They were not exclusionary provisions against the admission of kinds of evidence deemed inherently

unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. But prosecutions like this one have presented a special problem. To establish 'standing', Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."

See also Alderman v United States, 394 US 165, 22 Led2 176, 89 S Ct 961.

In Mancusi vs De Forte, 392 US 364, 20 Led2 1154, 88 S Ct 2120, the Court Stated:

"Furthermore, the Amendment does not shield only those who have title to the searched premises. * * * It was settled even before our decision in Jones v United States, 362 US 257, 4 L Ed2d 697, 80 S Ct 725, 78 ALR2d 233, that one with a possessory interest in the premises might have standing. See, e. g., United States vs Jeffers, 342 US 48, 96 L Ed 59, 72 S Ct 93. In Jones, even that requirement was loosened, and we held that 'anyone legitimately on premises where a search occurs may challenge its legality...when its fruits are proposed to be used against him.' 362 US, at 267, 4 L Ed2d at 706, 78 ALR2d 233. The Court's recent decision in Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507, also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was

one in which there was a reasonable expectation of freedom from governmental intrusion. See 389 US, at 352, 19 L Ed 2d at 582."

In Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507, the Court stated:

"In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' Secondly, the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual

States."

In Cash v Williams, 455 F2d 1227, 6th Cir., 1972, the Appellant had lent his automobile to his brother-in-law, Sharperson. Sharperson was stopped by a deputy sheriff and charged with reckless driving and driving without a license. A title check showed that Sharperson's statement that the automobile belonged to the appellant was true. A wrecker operator, Rainey, was summoned to the scene and instructed to lock the automobile in his garage. Rainey was searching the car for evidence of ownership and uncovered some marihuana. The Appellant, Cash, was convicted of possession of marihuana and appealed. The Court held:

"We cannot agree with this contention, in order to establish standing to contest a search, a defendant must show that he owned or possessed the seized property or that he had a possessory interest in or was present at the premises searched. An additional consideration arises from the fact that

when the crime charged is one of possession, a defendant will not be forced to sacrifice his fifth amendment rights in order to assert his fourth amendment rights. Jones v United States, 362 U.S. 257, 263-264, 80 S. Ct. 725, 4 L Ed.2d 697 (1960). See also: Clisson v United States, 406 F.2d 423, 427 (5th Cir. 1969); Weed v United States, 340 F2d 827, 829 (10th Cir. 1965); United States v Eldrige, 302 F2d 463, 464-465 (4th Cir. 1962); United States v Lewis, 270 F.Supp. 807, 809 (S.D.N.Y. 1967), aff'd, 392 F.2d 377 (2d Cir. 1968). We conclude that appellant's ownership of the automobile conferred standing upon him to challenge the validity of the search and the admissibility of the evidence seized."

"We can find no justification for the warrantless search by the police. The question of whether the information supplied to the police presented reasonable cause for a search of the automobile was for the determination of a magistrate; only in

exceptional cases may this decision be made by the police."

If the testimony of Sandoval is to be believed and to support a conviction it has to be believed, then it is evident that this Petitioner and the co-defendant, Chapa, were the owners of the seized goods, the marihuana. In addition, we have the vehicle that according to Sandoval and the officers the appellants were riding in convoy with the seized merchandise.

Under these circumstances, it is respectfully submitted that this Petitioner and the co-defendant, Chapa, have standing to object to the unlawful search and seizure and that the motion to suppress should have been granted.

Conclusion Under Question No. 1:

The Trial Court erred in denying the motion of this Petitioner to suppress the evidence and the Court should have rendered a judgment of acquittal.

Question No. 2 (Restated)

Did the trial court err in permitting testimony to be received from the alleged co-conspirator?

Even if we might assume, for the moment, that the marihuana was admissible as against the Petitioner and his co-defendant, Chapa, the testimony of Sandoval should have been disallowed and suppressed under the "Fruit of the Poisonous Tree" Doctrine.

In Walder v US, 347 US 62, 98 L Ed 503, 74 S Ct 354, the Supreme Court stated:

"The Government cannot violate the Fourth Amendment--in the only way in which the Government can do anything, namely through its agents--and use the fruits of such unlawful conduct to secure a conviction. Weeks v U. S. (US) supra. Nor can the Government make indirect use of such evidence for its case, Silverthorne Lumber Co. v U.S., 251 US 385, 64 L ed 319, 40 S Ct 182, 24 ALR 1426, or support a conviction on evidence

obtained through leads from the unlawfully obtained evidence, cf. *Nardone v U.S.*, 308 US 338, 84 Led 307, 60 S Ct. 266. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."

In 29 Am Jur 2d at page 474, it is stated:

"The policy underlying the rule against the use of evidence obtained by an unreasonable search and seizure cannot be circumvented by the use against the victim of evidence indirectly obtained, as a result of information derived from the illegal search or seizure. The exclusionary rule extends beyond evidence directly seized in an unlawful search to proscribe use of all evidence obtained as an indirect result of such illegal activity--'the fruit of the poisonous tree.' This 'fruit of the poisonous tree' doctrine extends, however, only to facts which were actually discovered by a process initiated by the unlawful act; if information

which could have emerged from an unlawful search in fact stems from an independent source, the evidence is admissible. On the other hand, a showing that the prosecution had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search does not excuse the illegality or cure tainted matter."

In United States v Tane, 329 F2 848, 2d Cir. 1963, the Court stated:

" 'The Fruit of the Poisonous Tree' "

The next question which must be answered is whether the testimony of Wesley Pase before the indicting Grand Jury was the derivative product of the wiretap. We hold that it was. The identity of Pase was derived from the wiretap, and Pase was unwilling to testify or even admit to making any unlawful payments until possession of the wiretap of the December 6 conversation was revealed by the Assistant District Attorney.

The government next contends that Pase's testimony was not subject to suppression because it was the product of an intervening voluntary act, breaking the necessary nexus between the tap and the testimony. While the proffer of a living witness should not be 'mechanically equated with the proffer of inanimate evidentiary objects illegally seized,' *Smith v U.S.*, 324 F2d 879, 881 (D. C. Cir. 1963); *McLindon v U.S.* 117 U.S. App. D.C. ____, 329 F2d 238 (1964), the government has failed to carry its burden of showing that the information gained from the wiretap did not lead, directly or indirectly, to the discovery of Pase and to Pase's willingness to testify. See *United States v Coplon*, 185 F2d 629, 636, 28 A.L.R.2d 1041 (2 Cir. 1950). Indeed, the record demonstrates that the identity of Pase and knowledge of his implication in unlawful payments was derived from the wiretap, and that Pase was unwilling to testify or even admit to making any unlawful payments

until he was told by the Assistant District Attorney that the December 6 conversation between his attorney and union officials had been tapped. The road from the tap to the testimony may be long, but it is straight."

Conclusion Under Question No. 2:

The Trial Court did err in permitting testimony to be received from the alleged co-conspirator, the motion to suppress should have been granted and the Court should have rendered a judgment of acquittal.

Question No. 3 (Restated)

Did the Honorable Court of Appeals err in holding that even though the District Court prior to the trial, and without a hearing, denied petitioner's motion to suppress on the ground of lack of standing, the petitioner was required to object to the introduction of the evidence in question at the time the government offered it into evidence and again request a hearing on his motion outside the presence of the jury, and that his failure to do so rendered any prior errors harmless?

Included within this question is the further question, "In a motion to suppress, with what degree of particularity must a defendant allege his basis for such motion, the facts on which he relies to establish standing to object, and the evidence he desires to suppress; and must the defendant object to the introduction of such evidence when an attempt is made to introduce it

at the trial on the merits?"

In U.S. v Warrington, 17 FRD 25, USDC for the Northern District of California (1955), the Court stated:

"As a guide for further proceedings in this particular case and all future proceedings in this Court under par. (e) of Rule 41 of the Rules of Criminal Procedure, this Court now establishes the following procedure, to-wit:

1. The motion for return of property and to suppress evidence must be in writing.
2. The motion must set forth in detail the ultimate facts which will be relied upon by the moving party, but should not set forth facts of an evidentiary nature.
3. The motion should not be verified.
4. The motion must be supported by points and authorities.

5. No affidavit may be filed in the proceeding by either the moving party or the Government without the express consent of the Court having been first had and obtained. (An affidavit will always be permitted when either party contends that the proceeding can be determined on a point of law without an issue of fact being involved.)

6. The defendant will be required to support his motion by competent evidence that must make a prima facie showing that his motion has merit.

7. The Government will be given an opportunity to controvert the defendant's evidence given in support of his motion.

8. Both parties will be given all reasonable opportunity to rebut the testimony offered by the other.

9. The defendant may not be cross-examined by the government unless he voluntarily

offers himself as a witness in the proceedings.

10. Under no circumstances may either party digress from the true issues involved in this proceeding, and use it for a 'fishing expedition.' "

This case was decided well before the decision of the Supreme Court in *Simmons v U.S.*, 390 U.S. 377, 19 Led2 1247, 87 S Ct 967 (1968), and it is apparent that the court was requiring the defendant to sacrifice his Fifth Amendment Rights in order to claim his Fourth Amendment Rights, as he would have had to admit guilt in his motion to suppress with no assurance of any immunity.

In *Simpson v U.S.*, 346 F2 291, 10th Cir. 1965, the Court made the following statement:

"Appellant here did make a timely motion to suppress evidence, and, while the motion was general, the hearing was full and revealed the activities of federal officers. The Constitutional

violation was adequately protested."

In Waldron v U.S., 219 F2 37, District of Columbia (1955), the Court stated:

"It seems to us the same elementary principles must apply when a motion to suppress has been made under Rule 41 (e) and denied by the court. In denying such a motion based upon an allegation of unconstitutional search and seizure, the court passes upon an important point of law, frequently one of the most important in the case. The court conducts a hearing for the purpose, receives evidence, and renders a legal judgment. If it were necessary that the point be raised again during the course of the trial, the whole procedure of hearing, testimony, etc., would have to be repeated, a useless performance; or the court would merely enter again its prior conclusion without further hearing, an equally useless performance. The movant has a right to renew his point; it would be safer and more skillful to

interpose an objection when the evidence is offered; but we think he is not required to do so. He does not waive it and is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case accordingly. To hold otherwise would be to inject a pure technicality, without a purpose, into the conduct of trials, requiring counsel to repeat a contention already disposed of in the proceeding; and this in respect to a waiver of a constitutional right. The fact that the court might in its discretion entertain a motion to suppress during the trial does not make it obligatory upon parties to renew such motions during trial or to object in any other way to the evidence at the trial."

In Simmons, the Court stated:

"We therefore hold that when a defendant testifies in support of a motion to suppress evidence on 4th amendment grounds, his testimony may not thereafter be admitted against him at trial on the

issues of guilt unless he makes no option."

Counsel for Petitioner has been unable to find any firm holding that the statements in the motion may not be considered a judicial admission against interest, even though it would certainly appear that statements in the motion would come under the Simmons Rule. However, the defendant is still forced to take that chance.

Old Rule 41 (e) of the Federal Rules of Criminal Procedure, reads as follows:

See Appendix C pages 1 and 2.

New Rule 41 (e) and (f) of the Federal Rules of Criminal Procedure now read as follows:

See Appendix D pages 1 and 2.

However, this new rule sheds no light whatsoever on the question.

Therefore, with little, if no, authority, to solve this dilemma, this Petitioner respectfully submits that in a motion to suppress a

defendant should only be required to state the time, place and date of the unlawful search and seizure, the parties involved, and that his Fourth Amendment rights were violated. This information would apprise the Government to which illegal search and seizure the defendant refers. Thereafter, the defendant would have a right to prove at the hearing on the motion the basis for his contention that his Fourth Amendment rights had been violated, upon what facts he relies to give him standing to object and what evidence he desires to have suppressed. It seems clear that under the authority of *Waldron v U.S.*, he is not required to renew his objections.

Conclusion Under Question No. 3:

The decision of the Honorable Court of Appeals in this case is in direct conflict with the Court of Appeals in the *Waldron vs U.S.*, supra, case, and this Honorable Court should follow

the well-reasoned decision in the Waldron case and find that the failure to object to the introduction of the evidence at the time it was offered did not render any prior errors harmless.

Question No. 4 (Restated)

Did the Honorable Court of Appeals err in holding, if indeed it did so hold, that the testimony of the Border Patrolmen who stopped and searched the automobile in which the Defendants were riding should not have been suppressed?

Border Patrolman Wheeler testified in part as follows:

Q Will you please tell the court and jury the circumstances around the stopping of that vehicle?

A Patrol Agent Tharp and I were conducting what we call a traffic observation, and we were proceeding on 1017 which runs between Hebbronville and La Gloria, as we were proceed-

ing south, ten miles south of La Gloria, we observed this '62 Chevrolet stake bed truck going north on the highway as we were going south and behind it was a white over yellow Ford. Agent Tharp was driving our patrol vehicle and we turned around and gave pursuit to the two vehicles and in doing so, the Ford passed the truck. We pulled in behind the stake bed truck and redlighted it with our car and pulled the truck over and I was let out to the truck and my partner, Mr. Tharp, proceeded on to check the Ford car, ---." (Lines 18-25, p. 5 and Lines 1-7, p. 6 of Transcript.)

Q And you saw ahead of you a truck?

A Well, as we were going south the truck was coming toward us and it passed, like this, and the car was directly behind the truck, sir.

Q. Then the first time you saw the car was after you passed the truck?

A Yes, sir, the car was behind the truck.

Q And you all decided to turn around and follow the truck.

A We decided to check both vehicles.

Q And in the process of you all turning around, the car had gone ahead and passed the truck?

A Yes, sir, as we turned around, he passed the truck and went ahead.

(Line 25, p. 7; and Lines 1-13, p. 8 of Transcript).

Border Patrolman Tharp testified in part as follows:

Q Will you please tell the court and the jury, the circumstances around your seeing Mr. Sandoval and Mr. Flores and Mr. Chapa?

A We were going south on Farm to Market Road 1017 and we met a white Chevrolet truck with a van type body on it followed very closely by a yellow LTD Ford with a white vinyl

top, and we thought we had something there going. It looked suspicious because they were traveling at a slow speed.

MR. JOHNSON: I am going to object to any opinions, Your Honor.

THE COURT: I think that is well taken, I sustain it.

Q Just tell us what you did.

A So I was driving and turned the red light on and stopped the truck and my partner got out with the driver of the truck and then I proceeded and stopped the Ford.

Q How far away did you stop the Ford from the truck?

A Half a mile or mile.

Q What happened when you stopped the car?

A I identified myself as a Border Patrolman and asked them to state their citizenship, and asked them to open the trunk, which they did readily, and I had no reason to hold them so I

turned them loose." (Lines 5-25, p. 11 and Lines 1-4, p. 12 of Transcript).

In U.S. v Brignoni-Ponce, _____ U.S. _____, 45 Led2 607, 95 S Ct _____, decided on June 30, 1975, the Supreme Court held that:

"Even if they (the officers) saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were alien, nor a reasonable belief that the car concealed other aliens who were illegally in the country. ---The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."

Certainly the fact that a car is traveling slowly would not justify any officer in stopping it unless there were other relevant factors.

This Petitioner respectfully states, therefore, that the evidence of Border Patrolmen Tharp and Wheeler, insofar as it pertains to the stopping of the Petitioner's vehicle, should be suppressed.

Conclusion Under Question No. 4:

The Honorable Court of Appeals did err in holding, if it can be assumed that it did so hold that the testimony of the Border Patrolmen should not have been suppressed. The testimony should have been suppressed and the trial court should have rendered a judgment of acquittal.

SUMMARY

It seems patently clear that the Trial Court erred in denying the Petitioner's motion to suppress on the ground that the petitioner did not have standing solely because he was not present at the time of the seizure. This being the case, it is respectfully urged that it would

have been completely useless to have attempted to argue the matter further with the Court or to even ask to put on additional evidence, since any evidence could not have changed the fact that the petitioner was not present at the time of the seizure and, therefore, there is no indication whatsoever that the Court would have changed its mind even if a hearing had been had.

WHEREFORE, Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J. G. Hornberger
915 Victoria St.
Laredo, Texas 78040

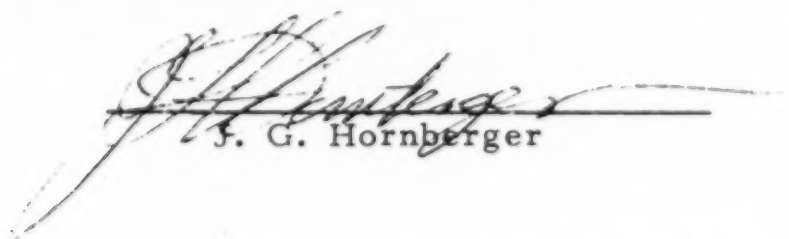
John L. Johnson
1620 Guaranty Bank
Corpus Christi, Texas 78401
Attorneys for Petitioner

by

-40-

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 1976, two copies of Petitioner's Petition for a writ of certiorari were by me mailed to the United States Attorney for the Southern District of Texas, P.O. Box 61129, Houston, Texas, 77061, and three copies were on said date mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.


J. G. Hornberger

-41-

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3284

UNITED STATES OF AMERICA,

Plaintiff-Appellee

V.

GIL FLORES AND WILLIE CHAPA,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas

(October 30, 1975)

Before BROWN, Chief Judge, TUTTLE and
RONEY, Circuit Judges:

PER CURIAM:

Appellants Flores and Chapa appeal
from convictions of conspiracy to possess
marijuana with intent to distribute, a violation
of 21 U. S. C. §§ 841 (a) (1) and 846, and

App. A-1

of aiding and abetting one Sandoval, an un-
indicted co-conspirator, to possess with intent
to distribute the same quality of marijuana.
They assign as error a pre-trial ruling by
the district court that they lacked standing to
challenge the search of the vehicle which
produced the marijuana in question.

Evidence produced at trial, primarily
the testimony of Sandoval as the government's
witness, showed that appellants hired
Sandoval to repair a truck and then drive
it with a load of marijuana from Rio Grande
City to Austin, Texas. En route to Alice,
Texas (a planned stop prior to Austin),
however, Sandoval, who was being followed
closely by appellants in another vehicle, was
stopped and questioned by Border Patrol agents
as were appellants. Appellants were not pre-
sent at the scene when the search of Sandoval's

App. A-2

vehicle was conducted and the marijuana discovered. Their pre-trial motion to suppress, moreover, failed to allege any sort of proprietary or possessory interest in the vehicle or the contraband. See Brown v. United States, 411 U.S. 223 (1972). The district court, without a hearing denied their motion to suppress on the ground of lack of standing.

Subsequently, when the evidence resulting from the search was introduced at the trial no objection was made by the defendants.

Appellants argue that the fact that the district court denied them the opportunity to prove standing in a pre-trial hearing relieved them from the duty to object at trial to the introduction of the evidence at issue here. We cannot agree. Had appellants made such an objection during the course of the trial, the district court could then have held a hearing, outside the presence of the jury, on the standing

issue -- whether appellants, as they now claim on appeal, had demonstrated a possessory or proprietary interest in the truck or marijuana sufficient to satisfy Brown. Given the existence of such an opportunity to object and request a hearing and appellants' failure to do so, we hold that under the circumstances of this case they are foreclosed from raising the issue on appeal. It was the introduction of the evidence at the trial that would have been harmful error if it was illegally obtained. There having been no objection to its reception into evidence any prior errors became harmless. See Fed. R. Crim. P. 51 and 52.

JUDGMENT AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3284

UNITED STATES OF AMERICA,

Plaintiff-Appellee

Versus

GIL FLORES AND WILLIE CHAPA,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(December 4, 1975)

Before FROWN, Chief Judge, TUTTLE and

RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Gil Flores in the above entitled and numbered cause be and the same is hereby denied.

App. B-1

Old Rule 41 (e) of the Federal Rules of Criminal Procedure, read as follows:

"Motion for return of property and to suppress evidence. --A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be

App. C-1

restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

New Rule 41 (e) and (f) of the Federal Rules of Criminal Procedure now read as follows:

"Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized, The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

"Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."